

Proposals on clauses 23 and Classification Review Panel

28 July 2011

CLAUSE 23 (as agreed)

23 (1) If a request is made for information and it is established that the information requested is classified, that request must be referred to the relevant head of the organ of state for a review of the classification status of the information requested.

(2) In conducting such a review the head of an organ of state must take into account the conditions for classification and declassification as set out in this chapter.

(3) The head of the organ of state concerned must declassify the classified information in accordance with section 19 and grant the request for information if that information reveals evidence of -

(i) a substantial contravention of, or failure to comply with the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the information clearly outweighs the harm that will arise from the disclosure.

Insert time periods:

(4) The head of the organ of state must –

(a) within 14 days of receipt of the request contemplated in subsection 3(a) (ii) grant the request for the declassification of classified information; or

(b) within 30 days, of receipt of the request contemplated in subsection (3) (a) (i) grant the request for the declassification of classified information.

Automatic review

(6) If an application for a request referred to in subsection (1) is received, the head of the organ of state must conduct a review of the classified information held by that organ of state relating to the request for declassification.

CLASSIFICATION REVIEW PANEL

In respect of access (as agreed)

Establishment of Classification Review Panel

xx. (1) There is hereby established a Panel to be known as the Classification Review Panel.

(2) All organs of state must provide the Classification Review Panel such assistance as may be reasonably required for the effectiveness of the Classification Review Panel in the performance of its functions.

Proposal 1: (Inspector- General)

(xx) Despite anything to the contrary contained in this Act or any other law, the Classification Review Panel—

(a) must have access to any classified information under the control of any organ of state if such access is required by the Classification Review Panel for the performance of the Panel's functions, and the Classification Review Panel is entitled to demand from the head of the organ of state in question and its employees such classified information, reports and explanations as the Classification Review Panel may deem necessary for the performance of its functions;

(b) The Classification Review Panel must inform the head of an organ of state in writing of its intention to have access to the premises of the organ of state in question

(c) The notice referred to in paragraph (b) must specify the date and the nature of access to the premises;

(d) The Classification Review Panel may, if the classified information received by it in terms of paragraph (a) is subject to any restriction in terms of any law, disclose it only—

(i) after consultation with the President and the Minister responsible for the organ of state in question; and

(ii) subject to appropriate restrictions placed on such classified information by the Classification Review Panel, if necessary; and

(iii) to the extent that such disclosure is not detrimental to the national security¹;

(e) must have access to any other classified information or premises which is not under the control of any organ of state if such access is necessary for the performance of the Classification Review Panel's functions in terms of section xxxx and the Classification Review Panel is entitled to demand from any such person such classified information, reports and explanations as the Panel may deem necessary for the performance of its functions: Provided that the Classification Review Panel may not have access if the classified information is not necessary for the performance of its functions: Provided further that the Classification Review Panel must first obtain a warrant issued in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), if the classified information or premises are not under the control of the organ of state in question;

(f) may, if the classified information received by the panel in terms of paragraph (e) is subject to any privilege or restriction in terms of any law, disclose it only—

(i) after the panel has given written notice of its intention to do so to the lawful possessor of the classified information; and

(ii) after consultation with the President and the Minister responsible for the classified in question; and

(iii) subject to appropriate restrictions placed on such classified information by the Classification Review Panel, if necessary; and

(iv) to the extent that such disclosure is not detrimental to the national security.

(9) No access to intelligence, information or premises contemplated in subsection xxxx may be withheld from the Classification Review Panel on any ground.

¹ The function of the CRP and whether within power to disclose

PROPOSAL 2:

Public Audit Act, 25 of 2004

Xxx (1) When performing a function referred to in section xxx the Classification Review Panel or an authorised member has at all reasonable times full and unrestricted access to any document, book or written or electronic record of classified information of the organ of state or which reflects or may elucidate such classified information ;

(2) The Classification Review Panel or an authorised member may for the purpose of a review —

(a) enter any property, premises or vehicle of or under the control of an organ of state , including any property, premises or vehicle where a document, book or written or electronic record of classified information referred to in subsection (1) is kept; or

(b) direct a person to produce, or to deliver at a specified place and time and in a specified format any such document, book or written or electronic record of classified information.

(c) inspect, and question any person about, any such document, book or written or electronic record or information, or any such asset;

(d) copy, or make extracts from, any such document, book or written or electronic record of classified information, at the expense of the organ of state , or remove such document, book, record or written or electronic classified information to make copies or extracts;

(e) direct a person to disclose, either orally or in writing, any classified information that may be relevant for the review or

(f) direct—

(i) a person to disclose classified information or to give answers to questions in terms of this subsection in writing or under oath or affirmation; or

(ii) that any such information or answers be recorded.

(3) (a) A person who is required in terms of any legislation to maintain secrecy or confidentiality, or not to disclose information relating to a matter, may be required by the Classification Review Panel to comply with any of the requirements in this section, even though the person would be otherwise in breach of that person's obligation of secrecy or confidentiality or non-disclosure.

(b) Compliance with a requirement of this section is not a breach of any applicable legislation imposing the relevant obligation of secrecy or confidentiality or non-disclosure.

(4) 1) An organ of state must—

(a) render all reasonable assistance to the Classification Review Panel or an authorised member performing the review to enable the Classification Review Panel or an authorised member to complete the review within any applicable timeframes; and

(b) accede free of charge to all reasonable requests of the Classification Review Panel or an authorised member to facilitate the expeditious completion of the review, including—

(i) the provision of suitable office accommodation and parking on the organ of state's premises;

(ii) logistical support required for the proper carrying out of the review; and

(iii) access to office equipment.

Proposal three:

Promotion of Access to Information

Xxx (1) If the Classification Review Panel informs the head of an organ of state that the Panel wishes to review classified information kept by of that organ of state the head of an organ of state must render such reasonable assistance, free of charge, as is necessary to enable that the Classification Review panel to comply with section xxx (functions)

(2) If it is apparent on receipt of a request for access that it should have been made to another organ of state, the head of an organ of state concerned must render such assistance as is necessary to enable the Classification Review Panel to identify the appropriate organ of state

Proposal 4:

xxx No organ of state or employee of an organ of state may interfere with, hinder or obstruct the Classification review panel or any member thereof or a person appointed under section XXX in the performance of its, his or her functions.

Or

Proposal 5

No person or organ of state may interfere with the functioning of the Classification Review Panel.

Appointment of staff: (as agreed)

(1) The Chairperson of the Classification Review Panel must appoint staff to assist the Panel in carrying out its functions.

[(2) The Classification Review Panel must determine the remuneration, allowances, benefits and other terms and conditions of appointment of members of staff taking into account the Public Service Act, 1994 (Proclamation No. 103 of 1994).]

(3) A person may not be appointed under subsection (1) unless that person has a valid security clearance certificate issued under the National Strategic Intelligence Act, 1994 (Act No 34 of 1994).

Constitution and appointment of Classification Review Panel

xxx. (1) [The Classification Review Panel consists of five members appointed by the Minister upon the approval by Parliament by resolution, according to the following principles, namely—]

- (a) participation by the public in the nomination process;
- (b) transparency and openness; and
- (c) the publication of a shortlist of candidates for appointment, with due regard to subsections (2), (4) and (5).]

New sub clauses:

(1) The Minister, on the recommendation of the National Assembly, must appoint the the members of the Classification Review Panel.

(2) The National Assembly must recommend persons—

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote of a majority of the members of the Assembly.

(3) Due regard must be given to the following principles, namely—

- (a) participation by the public in the nomination process;
- (b) transparency and openness; and
- (c) the publication of a shortlist of candidates for appointment.

(3) The Joint Standing Committee on Intelligence must prepare a list of nominees and must submit a list of suitable candidates for approval by the National Assembly

(4) The National Assembly must upon approval submit the list to the Minister for appointment.

(4) The Classification Review Panel is headed by a Chairperson who must either be an admitted attorney or advocate with at least ten years legal experience.

(5) **[Other]** The other four members of the Classification Review Panel must be suitably qualified of whom at least one member—

- (a) must have expertise in the Constitution and **[the]** law;
- (b) must have knowledge and experience of national security matters; and
- (c) must have knowledge and experience of archive related matters.

(6) The members of the Classification Review Panel are appointed for a term of five years which term is renewable for one additional term only.

(7) A person may not be appointed as a member of the Classification Review Panel unless that person has a valid security clearance certificate issued under the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

Disqualification from membership (as agreed)

xx. (1) A person may not be appointed as a member of the Classification Review Panel if he or she—

- (a) is not a citizen of the Republic;
- (b) is not resident in the Republic;
- (c) is appointed by, or is in the service of, the state and receives remuneration for that appointment or service;
- (d) is a member of Parliament, any provincial legislature or any municipal council;
- (e) is an office-bearer or employee of any party, movement or organisation of a party-political nature;
- (f) is an unrehabilitated insolvent;
- (g) has been declared to be of unsound mind by a court of the Republic;
- (h) has been convicted of an offence in the Republic, other than an offence committed prior to 10 May 1994 associated with political objectives, and was sentenced to imprisonment without an option of a fine.

- (i) has been removed from an office of trust on account of misconduct involving theft or fraud.

Removal of office (as agreed)

xx. (1) A member the Classification Review Panel may be removed from the Panel on -

- (a) the grounds of misconduct, incapacity or incompetence;
- (b) a finding to that effect by the Joint Standing Committee on Intelligence; and
- (c) the adoption by the Assembly of a resolution calling for that member's removal [**the National Assembly adopted a resolution calling for that person's removal**] as member from the Classification Review Panel.

(2) A resolution of the National Assembly concerning the removal of a member from the Classification Review Panel must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The Minister—

- (a) may suspend a member from the Classification Review Panel at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
- (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

(4) A member ceases to be a member of the Classification Review Panel if that member-

- (a) resigns;
- (b) fails to attend three consecutive meetings of the Classification Review Panel, unless his or her apology has been accepted; or
- (c) becomes disqualified in terms of section xxx.

(5) A vacancy in the Classification Review panel must be filled as soon as practicable in accordance with section XXX.

Remuneration of members and staff (as agreed)

xx. Members of the Classification Review Panel and staff of the Classification Review Panel must be paid such remuneration and allowances as determined by the Minister with the concurrence of the Minister of Finance.

Meetings of Classification Review Panel (as agreed)

xx. (1) The Classification Review Panel meets as often as the circumstances require, but must meet at least once a month, at such times and places as the chairperson may determine.

(2) The Classification Review Panel may determine its own procedure for its meetings.

(3) The quorum for any meeting of the Classification Review Panel is three members.

(4) Any decision taken by the Classification Review Panel is **[valid]** not invalid merely by reason of a vacancy on the Panel provided that **[if]** the required quorum is present at that meeting.

Reporting (as agreed)

xx. (1) The Classification Review Panel must, in respect of each financial year, prepare an annual report on the activities of the Classification Review Panel undertaken during the financial year.

(2) The Classification Review Panel must ^{table} ~~submit~~ the report contemplated in subsection (1) to Parliament within 30 days of receipt thereof if Parliament is in session, or if Parliament is not in session within 14 days after the commencement of the next Parliamentary session .

(3) The Classification Review Panel must, **[through]** furnish any other report as the Joint Standing Committee on Intelligence, [submit any other report that Parliament may require] request.

(4) The Chairperson of the Classification Review Panel must publish **[any]** the annual report of the Classification Review Panel.

Transitional Arrangement (as agreed):

Xxx (1) Subject to section 20 -

(a) On the date on which this Act takes effect, any information classified under MISS Guidelines, the Protection of Information Act, 1982 (Act No 42 of 1982) or any other law, must be reviewed and an audit report must be compiled by the head of the organ of state concerned on the classified status of all classified information held by that organ of state.

(b) The Agency must review and compile an audit report on the classified status of all classified information of a defunct organ of state or agency that has no successor in function.

(c) The relevant head of an organ of state or the Agency, as the case may be, must submit an audit report within a reasonable period² to the Classification Review Panel.

OFFENCES:

A head of an organ of state who wilfully or in a grossly negligent manner fails to comply with the provisions of this Act commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.

Definition:

"Request for access", in relation to classified information means a request for access to a record of a public body in terms of section 11 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000).

² Time period may be considered

Clause 38:

Disclosure of classified information and related information:

38. Any person who unlawfully discloses classified information in contravention of this Act is guilty of an offence and liable on conviction to imprisonment for a period not less than three years but not exceeding five years, except where such disclosure is-

(a) protected under the Protected Disclosures Act, 2000 (Act No 26 of 2000); or section 159 of the Companies Act, 2008 (Act No 71 of 2008); or

(b) authorised by any other law.